BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSEMOND Z. BOWERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,956
CESSNA AIRCRAFT COMPANY	)	
Respondent	)	
AND	)	
	)	
KEMPER INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on April 13, 1998. The Appeals Board heard oral argument November 13, 1998.

APPEARANCES

Gary K. Jones of Wichita, Kansas, appeared on behalf of claimant. Kirby A. Vernon of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found respondent offered claimant an accommodated job at a comparable wage but claimant failed to return to work on the date she was expected to return and, for that reason, was terminated. As a result, the ALJ denied claimant's request for work disability. Claimant argues she could not return on the date designated because she was detained while traveling out of state and she should still be allowed an award of work disability. Claimant also argues she is entitled to additional temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be modified.

Findings of Fact

1. Claimant began working for respondent on April 10, 1989, as a drill press operator. She became a tube mill operator on April 1, 1993.

2. In February 1996, claimant began experiencing problems with her neck, shoulders, arms, and hands. Claimant eventually saw Dr. Michael Shuck who took her off work as of October 21, 1996, after diagnosing bilateral carpal tunnel syndrome. Claimant last worked for respondent October 18, 1996, the Friday before she was taken off work.

3. Claimant saw Dr. Jay Stanley Jones on October 28, 1996. Dr. Jones released claimant to light duty. He restricted her against lifting over 20 pounds and recommended no pushing, pulling, grasping, or repetitive movements. Claimant took the restrictions back to respondent and was initially advised respondent could not accommodate the restrictions.

4. On October 8, 1996, claimant filed for a preliminary hearing. The hearing was held November 12, 1996, and the ALJ granted claimant's request both for additional medical treatment and for temporary total disability benefits. At the conclusion of that hearing, respondent's counsel stated that if the respondent determined it was able to accommodate claimant's restrictions, they would contact claimant's counsel.

5. After the preliminary hearing, claimant was not able to obtain an appointment with the physician respondent provided, Dr. John Hered, until December 16, 1996, and decided to visit her mother in Nevada. Claimant went to Nevada on November 19, 1996. While claimant was in Nevada, respondent decided to offer her accommodated work. On Thursday, November 21, 1996, respondent called claimant's home in Wichita and spoke with claimant's husband. Respondent advised him they wanted claimant to report back the next morning, Friday, November 22, 1996, at 7 a.m. She was to report for a physical exam before returning to an accommodated job. Claimant was in the process of a divorce, but her husband called her in Las Vegas and told her she was expected to report on the 22nd. Claimant called respondent and asked for additional time to report back. She did not tell respondent she was out of state, and respondent refused to give her the additional time.

6. Claimant attempted to return to work, as respondent requested, but was delayed. Claimant was able to obtain a plane ticket to return to Kansas but was bumped off the flight, apparently once in Las Vegas and then twice in Phoenix. In Phoenix, claimant became disorderly, apparently because she thought it might convince the airline to put her on the flight. She was initially detained for disorderly conduct and, in the course of a search, marijuana was found in claimant's possession. She was arrested and placed in jail.

7. Claimant testified she made various attempts to contact respondent or to have someone else contact respondent on her behalf. According to claimant, the jail would permit only collect calls long distance and respondent would not accept collect calls. She asked her parents and husband to call, but they did not do so. On Monday, November 25, 1996, respondent called claimant's home and claimant's husband informed them claimant was in jail. Claimant was released from jail on Monday, November 25. She flew back, arrived in Kansas City early morning on November 26, and drove from Kansas City to respondent where she reported at approximately 9:15 a.m.

8. Respondent terminated claimant the afternoon of November 26, 1996, based on a point system which assigned points to various types of employment policy violations. The system provided for termination once an employee received six points. Claimant had two points before these events. According to respondent she was assigned, in accordance with their policies, two additional points for each day she did not show for work and did not call to explain her absence. This gave two points each for not calling and not showing up on Monday (November 25) and Tuesday (November 26). In accordance with the policy, claimant was assigned two points for the 26th, even though she did appear at 9:15 a.m., because she did not show up or call within 30 minutes of the 7 a.m. start time.

9. Dr. Jones performed surgery for carpal tunnel on the right in January 1997 and on the left in June 1997.

10. Claimant was off work due to her injuries from October 18, 1996, when she initially left employment for respondent, and did not reach maximum medical improvements until she was rated, after surgery, by her treating physician on October 1, 1997.

11. At the regular hearing on January 26, 1998, claimant testified that she was not employed. She had applied at Boeing, Beech, Learjet, K-Mart, Target, Venture, Builders Square, Famous Footwear, Albertson's, Pet Care, Sam's Club, Wichita Inn, Holiday Inn, and Motel 6. Claimant also returned to Dr. Jones and requested that he modify her restrictions, stating she hoped less severe restrictions would help her obtain a job.

12. Dr. Jones issued revised restrictions in January 1998. The revised restrictions limit lifting to 30 pounds and limit pushing/pulling, grasping, and repetitive movements to no more than 30 minutes per hour.

13. Dr. Jones reviewed reports by vocational experts Jerry D. Hardin and Karen C. Terrill. Mr. Hardin opined that claimant can no longer, based on Dr. Jones' restrictions, do 57 percent of the tasks she did in 15 years of work before the accident. Ms. Terrill concluded claimant could not, again based on Dr. Jones' restrictions, do 26 percent of the tasks. Her list described the tasks differently. Dr. Jones agreed with Mr. Hardin's opinion. Dr. Jones initially also agreed with the conclusion by Ms. Terrill, but when he was asked about certain of the tasks listed, he did not agree that claimant could do some tasks, those involving frequent pushing/pulling for example, that Ms. Terrill thought claimant could do.

In the Board's view, Dr. Jones does not, in the end, agree with Ms. Terrill's opinion and does not provide an opinion which would allow calculation of the percentage loss based on Ms. Terrill's list of the tasks.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. K.S.A. 1996 Sup. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

4. The Board concludes the wage in the accommodated position from which claimant was terminated should not be imputed to claimant and claimant should not be limited to functional impairment.

Respondent contends a comparable wage should be imputed to claimant in this case because respondent offered accommodated work at a comparable wage but claimant was terminated from that job for failing to comply with company policy. She did not return to the accommodated job on the date requested and, according to respondent's interpretation of its policies, accumulated the six points which result in termination. Clearly a claimant who is terminated for cause will, in some cases, be treated as though he/she were earning the wage from that job. If the wage is at least 90 percent of the preinjury wage, the award will be limited to functional impairment. Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991). But the Board does not believe the statute, as interpreted by the applicable appellate decisions, necessarily requires that all terminations for cause be treated the same. Zarnowski v. Collingwood Grain, Inc., Docket No. 190,684 (April 1996).

The Board construes the relevant appellate decisions to require that a claimant make a good faith effort to obtain and retain employment after the compensable injury. If

the claimant does make a good faith effort but is not able to earn a comparable wage, the actual percentage wage loss will be used. If the claimant does not make a good faith effort, a wage will be imputed to claimant. In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Court imputed to the claimant the wage from the job respondent offered but claimant refused to even attempt. In Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), the Court ruled that a claimant must demonstrate that he/she made a good faith effort to find employment. If he/she does not, a wage will be imputed based on all relevant factors, including expert testimony about wage earning ability.

But, in our view, a claimant may make a good faith effort and still be terminated for cause. Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995). A claimant may, for example, be assigned work which does not exceed medical restrictions but which is beyond the claimant's skill level. In spite of good faith efforts, the claimant may not perform the job adequately. In the present case, the Board concludes claimant did not exercise good judgement but did make a good faith effort to return to the offered accommodated work. She certainly did not simply refuse to even attempt the work.

The Board acknowledges that some support for looking beyond the claimant's good faith efforts can be found in a recent decision by the Court of Appeals in Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* (1998). The Court of Appeals there comments on the impact the work disability policy may have on the employer's actions. In that case, claimant left her job with respondent because of physical problems from an injury but did not inform respondent this was the reason she was leaving. The evidence indicated respondent would have accommodated the injury had it known about the problems the claimant was having. The Board awarded work disability, but the Court of Appeals reversed. The Court mentioned the need to consider the policy implications and described the Board's decision as creating a rule which imposes unreasonable requirements on the employer:

> The decision would create a rule requiring employers to offer accommodated employment to an employee even when that employee has voluntarily terminated his or her employment with the employer. The employer also would be required to offer accommodated employment to someone who was no longer an employee, arguably even one who had quit years earlier, all in an effort to avoid excessive workers compensation awards.

One can argue that the Lowmaster decision, as applied here, means that termination for cause should never result in work disability. The argument would be that if work disability is awarded this would create a rule which requires employers to retain employees with a workers compensation injury, even those who violate company policy, all in order to avoid excessive workers compensation awards.

But the Lowmaster decision also expressly rests on the Foulk and Copeland decisions. Those decisions, in our view, look to the conduct of the employee. The Lowmaster decision also turns primarily on the conduct of the employee in failing to inform the employer why it was necessary for her to leave the employment. The Court of Appeals considered this failure by the claimant to be bad faith under these circumstances.

Respondent does not rely directly on the Lowmaster decision. Respondent argues simply that the wage loss must result from the injury. In this case, respondent argues claimant lost the wage because she failed to return on the date requested, not because of her injury. In our view, the loss of the wage was caused by a combination of factors. But where, as here, the injury makes the claimant unable to perform the job he/she was performing at the time of the injury and claimant then suffers a wage loss in spite of good faith efforts to obtain and retain employment, such a loss can reasonably be attributed to the injury.

The wage loss is, by statute, a simple calculation of the percentage difference between the wage before and the wage after the injury. K.S.A. 44-510e. The literal language of the statute is not ambiguous and provides for no exception to this calculation. As a general rule, it is not for the courts to determine the wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature. *In re* Marriage of Welliver, 254 Kan. 801, 869 P.2d 653 (1994). But the court may look to determine when the literal language of the statute produces a result which is so unreasonable or absurd that the legislature could not have intended those results. The Court of Appeals has held the wage loss factor in K.S.A. 44-510e such a case. The literal language would produce unreasonable or absurd results if the claimant is allowed to manipulate the calculation by refusing to attempt work which is offered, by failing to make a good faith effort in performing accommodated work, or by failing to make a good faith effort to find other work. *See* Perez, Foulk, and Copeland.

In the Board's view, these exceptions should be limited to circumstances where the claimant has not acted in good faith and should not venture into the employer's termination procedures. The award of work disability does not, of course, literally make any rules for what the employer can or cannot do. Nothing in this policy requires the employer to treat an employee with a compensable injury differently from the employee without an injury. The consequences to the employer may, in some cases, be different. The employer may be required to pay additional workers compensation benefits. But the award of work disability does not require the employer to retain an employee.

The consequences of termination may also be different for the injured employee than for one who is not injured. The difference should, in our view, be recognized by work disability benefits based in part on the actual wage loss except in cases where the claimant has not acted in good faith to retain or obtain employment after the injury. Even if this may result in work disability for some claimants terminated for cause, this reading of the statute

does not, in our view, produce results so unreasonable or absurd that the language of the statute should be ignored.

5. The Board makes no finding regarding whether the termination complied with respondent's policies. This is a disputed question in this case, but in view of the other findings, a finding on this question is not necessary to the decision.

6. The Board also concludes claimant made a good faith effort to find other employment after she left respondent.

7. Claimant has a wage loss, for purposes of calculating work disability, of 100 percent.

8. Claimant has lost the ability to perform 57 percent of the tasks she performed in the relevant 15-year period.

9. Claimant has a work disability of 78.5 percent. K.S.A. 44-510e.

10. Claimant is entitled to temporary total disability benefits from October 19, 1996, through October 1, 1997.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on April 13, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rosemond Z. Bowers, and against the respondent, Cessna Aircraft Company, and its insurance carrier, Kemper Insurance Company, for an accidental injury which occurred October 18, 1996, and based upon an average weekly wage of $779.62, for 49.71 weeks of temporary total disability compensation at the rate of $338 per week or $16,801.98, followed by 246.15 weeks at the rate of $338 per week or $83,198.02 permanent partial disability, making a total award of $100,000.

As of December 31, 1998, there is due and owing claimant 49.71 weeks of temporary total disability compensation at the rate of $338 per week or $16,801.98, followed by 65.15 weeks of permanent partial disability compensation at the rate of $338 per week in the sum of $22,020.70, for a total of $38,822.68 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $61,177.32 is to be paid for 181 weeks at the rate of $338 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Wichita, KS
Kirby A. Vernon, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director